



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

MISC. CRIMINAL APPLICATION NO. 134 OF 2017

IN THE MATTER OR ARTICLES; 22(1),23(1), 25 (a) (c) (d), 165, 258 & 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 296 (2) & 203 AS READ WITH 204 OF THE PENAL CODE, CAP 63 LAWS OF KENYA

AND

IN THE MATTER OF ORDER (b) OF THE SUPREME COURT JUDGMENT IN PETITION NO. 15 OF 2015; FRANCIS KARIOKO MURUATETU & ANOR

BETWEEN

MUMO MULANDI ALIAS KAMUMO.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Remission of matter to the High Court for re-hearing on sentence only)

RULING

1. The Applicant was convicted for the offence of robbery with violence under section 296(2) of the Penal Code. The particulars of count I were that on 11/04/2010 at premise area, Wote location, Makueni district within Eastern province, the Applicant jointly with others not before court while armed with crude weapons namely metal bars, robbed **Patrick Wambua Ndolo** Kshs.4,500/= and one mobile phone make Nokia 1110 worth Kshs.3,000/= and at the time of such robbery used actual violence on **Patrick Wambua Ndolo**.
2. The particulars of count II were that on the same day and place, the Applicant jointly with others not before court while armed with crude weapons namely metal bars, robbed Joseph Muia Ndolo one shirt, one cap and Kshs.3,000/= all valued at Kshs.3,500/= and at the time of such robbery, used actual violence on Joseph **Muia Ndolo**.
3. In his chamber summons application dated 24/07/2018, the Applicant is basically seeking a re-hearing of his sentence *to wit* death penalty and has grounded the application on the Supreme Court decision in Petition No. 15 of 2015; Francis Muruatetu Karioko.
4. The application was canvassed through written submissions, which were wholly relied on by the parties.
5. The Applicant through the firm of Maanzo and co. advocates submits that he was sentenced to death for the offence of robbery with violence and was never accorded a chance to mitigate. He has been in custody since 2010.
6. He also submits that his appeals to the High court and Court of Appeal were dismissed and he has exhausted his avenues of appeal thus serving a life sentence.
7. He submits that the death penalty was declared unconstitutional in the Muruatetu case (supra) and has therefore approached this court for enforcement of his fundamental rights and freedoms as enshrined in the constitution.
8. He contends that he has sought redress in the right forum as per the holding in **Makueni High Court Petition No. 3 of 2018** where Justice Kariuki agreed with the sentiments of Justice Majanja in **Michael Kathewa Laichena & Anor –vs- R (2018) eKLR to wit;**

“...by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by imposition of the mandatory death sentence.”

9. It is also his submission that no research has led to the conclusion that capital offenders cannot be reformed. He adds that he has reformed and is remorseful for his actions. He is a first offender who was 23 years at the time of the offence and is married with two children. That his last born child was less than one-year-old at the time of his incarceration. He contends that the period served is enough punishment and has urged the court to review the sentence to time already served.

10. Learned counsel Mrs. Owenga in response submits that the cogent nature of the prosecution evidence was confirmed by three courts thus leaving no doubt as to whether the Applicant committed the offence.

11. She acknowledges that the decision in the Muruatetu case (supra) paved way for convicts sentenced to death to have their matters remitted to the High court for re-hearing on sentence only.

12. It is her observation that the offences of Robbery with violence are prevalent in this country and contends that giving a lenient sentence will not deter such heinous law-less acts. She submits that the short duration served by the Applicant is not commensurate considering that he was charged with two counts. The State urges this court to consider the foregoing and give an appropriate sentence.

13. It's also the State's submission that nothing has been placed before the court to confirm that the Applicant has reformed.

Analysis and determination

14. Firstly, it is noteworthy that contrary to the Applicant's submissions, the death penalty was never declared unconstitutional. What the Supreme Court of Kenya did in the Muruatetu case (supra) is to declare the mandatory aspect of the death sentence unconstitutional (*emphasis mine*). In other words, the death sentence is still legal but not mandatory and this essentially gives discretion to Judicial officers to mete out alternative sentences to convicts of capital offences.

15. According to The *Sentencing Policy Guidelines, 2016* (“*the Guidelines*”) published by the Kenya Judiciary, the sentence imposed must meet the following objectives in totality;

(a) Retribution: To punish the offender for his/her criminal conduct in a just manner.

(b) Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.

(c) Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.

(d) Restorative justice: To address the needs arising from criminal conduct such as loss and damages.

(e) Community protection: To protect the community by incapacitating the offender.

(f) Denunciation: To communicate the community's condemnation of the criminal conduct.

16. The guidelines were published when the mandatory death sentence was still legal and as such, they did not provide for mitigating circumstances for offences which attracted the mandatory death sentence. To avoid a *lacuna*, the Supreme Court in the Muruatetu case gave the following guidelines to be considered by courts as mitigating factors during sentence re-hearing in a murder charge.

“[71]. As a consequence of this decision, paragraph 6.4 - 6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

a. age of the offender;

b. being a first offender;

c. whether the offender pleaded guilty;

d. character and record of the offender;

e. commission of the offence in response to gender-based violence;

f. remorsefulness of the offender;

g. the possibility of reform and social re-adaptation of the offender;

h. any other factor that the court considers relevant.

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that;

“25. GUIDELINE JUDGMENTS

25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”

17. Although the Supreme Court referred to a murder charge, the guidelines are applicable to other cases where the mandatory death sentence (as it was) had been imposed. This is in line with the Court of Appeal judgment in **William Okungu Kittiny –vs- Republic ([2018] eKLR)** where it was stated:

“...The Appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with

the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence ... is discretionary ...”

18. In the spirit of uniformity and fairness, emerging jurisprudence suggests that when dealing with sentence re-hearing in robbery with violence cases, the starting point should be 14 years. This is informed by the fact that the felony of robbery, which is a lesser offence than robbery with violence, attracts a term of imprisonment for 14 years. I have looked at sentences which have been imposed by other courts following the decision in the Muruatetu case.

19. In **Ibrahim Ali Halake –v- Republic [2019] eKLR** the Petitioner jointly with others while armed with dangerous weapons including a gun robbed a complainant of Kshs.60,000/-, and during re-sentencing the Court took into account the petitioner's age and the fact that he appeared to have been rehabilitated during his period of incarceration, including going to school. The Court set aside the life imprisonment and sentenced the Petitioner to serve five (5) years imprisonment from the day of the ruling in consideration of the fact that the petitioner had already served 15 years.

20. Additionally, in **Eldoret Court of Appeal Criminal Appeal No. 22 of 2016 [2018] eKLR: Wycliffe Wangusi Mafura –vs- Republic** the appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her. The Court of Appeal imposed a 20-year sentence.

21. A summary of the case before the trial court is that the Applicant was a motor cycle operator and was, on the material day, hired by two brothers, Pw1 and Pw3 to take them to Kaiti. The two brothers were from a club in Wote town. On reaching a place called premese, the Applicant switched off the motor cycle and turned off the lights. The two brothers were then attacked by some men who emerged from the sides. According to Pw1, they were ‘robbed and beaten senseless’. The Applicant then switched on the motor cycle, carried one of the assailants and rode off.

22. The investigating officer Pw2 said that Pw1 was seriously injured as his lower and upper jaws were broken. The Dentist, Pw4, confirmed that Pw1 had a fracture on the left mandible as well as bruises on the upper and lower limbs. The clinical officer, Pw5, testified that Pw3 had been injured on the head and right arm at the shoulders and elbow joint. The P3 form categorized the degree of Pw2's injuries as ‘harm’ while those of Pw1 as ‘grievous harm’.

23. It is actually disturbing that the Applicant, who was working in cahoots with other criminals, pretended to be ferrying his clients home, but instead, he set them up and deliberately put them in harms way. He also acted as the get-away motor vehicle and left without caring whether his clients were dead or alive. In the process, his clients and especially Pw1 sustained serious injuries. When asked to mitigate by the trial court, he stated as follows;

“All I can say is that I was not involved at all. That's all I can say.”

24. In my view, there are aggravating circumstances in this case and as correctly submitted by the state, the time served is simply not commensurate. The Applicant may not have inflicted the physical injuries but it was the role he played that enabled the other assailants to injure the victims and steal from them. Further, the Applicant was not remorseful at all because even after being found guilty, he continued to insist that he was not involved until the Court of Appeal confirmed his conviction and sentence.

25. This court has considered the evidence on record, the Applicant's age at the time of commission of the offence and the value of the property stolen and the serious injuries suffered by the victims. He was sentenced on 30th June, 2011 and has therefore been in jail for 8 years, 7 months. I have equally considered the fact that the Applicant betrayed the trust his customers had placed on him on that material night. This court did not receive any document from the prison department giving an insight about the Applicant's life there.

26. The upshot is that the application succeeds with the court making the following orders:

i. The death sentence and the commuted life imprisonment is hereby set aside.

ii. The same is substituted with a sentence of twenty (20) years imprisonment on each of the two counts from date of conviction. The sentences to run concurrently.

Orders accordingly.

Delivered, signed & dated this 6th day of February, 2020, in open court at Makueni.

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H. I. Ong'udi

Judge